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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 344

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO.,
*Petitioners,*

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF RESPONDENT IN OPPOSITION

W. H. DAVIDSON, JR.
3100 Travis Street
Houston, Texas
AUSTIN C. WILSON
RICHARD L. McGRAW
8th Floor Bank of the Southwest Bldg.
Houston, Texas
*Attorneys for Respondent,*
Transcontinental Gas Pipe Line Corporation

September, 1962

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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This cause is a companion case to three others at this term: No. 300, Socony Mobil Oil Company, Inc. v. Brooklyn Union Gas Company, et al; No. 303, Marathon Oil Company v. Brooklyn Union Gas Company, et al; and No. 339, Transcontinental Gas Pipe Line Corporation v. Brooklyn Union

Gas Company, et al. The parties are referred to herein as they have been in the petition and the petitions in these related cases.

## QUESTIONS PRESENTED

Petitioners seek to pose the questions whether:

1. Transco was under an obligation to exercise reasonable diligence to secure for Petitioners' benefit refunds from Mobil and Ohio?

2. Transco is liable to Petitioners whether or not it has collected or may collect or ever could have collected certain claimed overpayments from Mobil and Ohio?

It is respectfully submitted that neither of the questions Petitioners seek to pose had or now has any real bearing on a proper resolution of the controversy involved in these companion cases. In addition, these questions certainly are not the type of questions warranting certiorari.

## STATEMENT

The nature and results of the case are correctly stated in Petitioners' Statement. The only exception Respondent deems appropriate is to that portion of the Statement in the last paragraph on page 7 reading: ". . . Petitioners were, therefore, required to [appeal from the trial court judgment] in order to preserve their cause of action against Transco and to prevent the take nothing judgment from becoming final."

As this case was brought, submitted and decided, Petitioners' rights, if any, against Transco were and are completely immaterial to the ultimate disposition.

## ARGUMENT

### No Grounds for Review are Shown by Petitioner

Rule 19, which fixes the standard for granting writs of certiorari, requires that there be "special and important" reasons.

Petitioners tacitly recognize that the questions which they seek to present are not within the scope of Rule 19 in their suggestions as to "Reasons for Granting the Writ" (Petition 8). As appears from the face of the "Reasons": no federal question is presented by the petition; the questions involved are neither of general nor public importance; the decisions of the District Court and the Court of Appeals are not in conflict with the decision of another Court of Appeals; nor is the decision in conflict with applicable state law on "important state or territorial questions." As this court has previously stated, only "real and embarrassing conflicts of opinion and authority" justify intervention by writs of certiorari. *N.L.R.B.* v. *Pittsburg S.S. Co.*, 340 U.S. 498, 95 L. Ed. 479; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 99 L. Ed 897 and *Layne and Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 67 L. Ed. 712.

None of these standards is met by either question Petitioners seek to pose.

### The Judgments of the District Court and Court of Appeals are Correct

Actually the "questions presented" stated by Petitioners are not present in this case.

The pertinent provisions of the Federal Power Commission settlement order of November 7, 1955 (quoted at page 6 of the petition) divested Transco of any beneficial interest whatsoever in possible refunds from Mobil and Ohio and vested all beneficial interests therein in Petitioners and Transco's other customers.

Both the District Court and the Court of Appeals correctly held that during the pendency of the stay orders Mobil and Ohio were entitled to demand and collect the contract rates under their respective contracts with Transco, but their right to keep any amounts so collected in excess of the contract rates in effect on June 7, 1954 depended upon the outcome of the litigation they were pursuing against the Federal Power Commission denying its jurisdiction over them. Likewise both Courts below correctly held that in 1957 when Mobil and Ohio failed in such litigation and the stay orders terminated, a cause of action arose in favor of the real parties in interest (Petitioners and Transco's other customers) to recover from Mobil and Ohio the amounts collected by them in excess of the June 7, 1954 contract rates under the protection of the stay orders.

As the settlement order was entered by the Federal Power Commission in 1955, at any time after its entry Petitioners could have filed suit to assert such rights as they claimed to refunds. This could have been done during the pendency of the stay orders if Petitioners believed any cause of action then existed, which they obviously did not. Certainly suit could have been brought as readily in 1957 when the stay orders terminated and any cause of action accrued as in January of 1959.

The only question in this cause is simply whether Mobil and Ohio are entitled to keep the amounts collected by them in excess of their June 7, 1954 contract rates with Transco prior to their compliance with Federal Power Commission Orders 174 and 174A in 1957. If Mobil and Ohio are not entitled to keep such payments then since the 1955 settlement such money belonged to Petitioners and Transco's other customers.

If Mobil and Ohio were entitled to keep such money, then Petitioners were and are entitled to nothing.

Transco has throughout this litigation declined to take a position on Mobil and Ohio's liability to make restitution

other than to insist as a use-plaintiff that its many small customers other than Petitioners receive the same treatment as Petitioners.

The questions presented by Petitioners are at most purely procedural and in fact are mechanical.

Any refund obtained from Mobil and Ohio concededly belongs to Transco's customer companies; in this litigation, from Transco's standpoint, it is and at all times was immaterial whether Petitioners recovered directly against Mobil and Ohio or whether, as a matter of mechanics, Petitioners recovered against Transco and Transco had judgment over against Mobil and Ohio and accounted to Petitioners.

Both the District Court and the Court of Appeals readily recognized the nature of this problem and correctly concluded that in the case of Petitioners the judgment appropriately should be directly against Mobil and Ohio rather than the more complicated form of recovery from Transco with Transco recovering over from Mobil and Ohio.

We respectfully submit that no question more profound than this mechanical one is tendered by Petitioners who are confronted with the inescapable fact that they brought this lawsuit; that at any time after the settlement in 1955 and certainly at any time after the dissolution of the stay orders in 1957, at which point both Courts below held the cause of action arose, they could have brought the lawsuit. If they waited too long, which both Courts below held they did not, they have only themselves to blame. Transco at all times freely acknowledged (as it was bound under the settlement order of the Federal Power Commission to do) that it neither had nor claimed any beneficial interest in the subject matter of the litigation.

If for some reason this Honorable Court should conclude that both the District Court and the Court of Appeals erred and that Mobil and Ohio were entitled to keep the monies collected in excess of the June 7, 1954 contract rates during the pendency of the stay orders, we submit such

adjudication of the merits would conclude Petitioners' rights as well as Transco's.

If, on the other hand, this Honorable Court concludes the judgments of the District Court and Court of Appeals were correct, no reason exists to revise the mechanics implementing the judgment.

The one case cited by Petitioners, *Empire Gas and Fuel Co.* v. *Pendar*, 244 S.W. 184 by a Texas Court of Civil Appeals, illustrates the lack of merit in Petitioners' contentions. Pendar as Lessor and Empire as Lessee entered into an oil and gas lease by the terms of which Empire promised and agreed to commence drilling a well on the leased premises within 60 days from the date of the lease; complete the same either as a producing well or abandon it as a dry hole; and at 90 day intervals thereafter continue to drill additional wells until such time as the leased premises were thoroughly developed for oil and gas. In addition to the royalties provided in said lease, Empire promised to pay Pendar the sum of $30,000 out of oil produced from the lease.

Empire totally breached its solemn written contract. It did not drill any well and it refused to pay Pendar the $30,000. The Court of Civil Appeals in affirming the judgment of the Trial Court stated two governing rules of law:

> "1. That a party who agrees to pay a sum of money in a certain commodity which he is to produce and who fails to produce such commodity is bound to pay the amount stipulated in money; and
>
> "2. If proof is necessary to show that the commodity could have been produced, the burden is upon the party breaking its agreement to show that, if the agreement had been kept the commodity would not have been produced."

On neither rule do Petitioners come within the case. There was no undertaking on Transco's part to "produce" the refunds from Mobil and Ohio; Transco's express under-

taking was to account and pay over to its customer companies any refunds from Mobil and Ohio, which obligation Transco never denied. As to the second rule stated in this case relied upon by Petitioners, this litigation and the judgments rendered herein will provide a complete and absolute answer to the question of whether "the commodity would have been produced." If Mobil and Ohio are entitled for some reason to keep the overpayments then that is a complete answer binding upon both Transco and Plaintiffs; if, on the other hand, the fund "would be produced" as both Courts below held then Petitioners have by the judgments herein recovered their share thereof.

No reason whatsoever exists, whatever action the Court may take on Mobil and Ohio's petitions, in our opinion to grant this petition for certiorari and we respectfully submit that it should be denied.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

W. H. DAVIDSON, JR.
3100 Travis Street
Houston, Texas
AUSTIN C. WILSON
RICHARD L. McGRAW
8th Floor Bank of the Southwest Bldg.
Houston, Texas

*Attorneys for Respondent,*
Transcontinental Gas Pipe Line Corporation

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